Supreme Court, U.S.
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No. 10-104 JUL 16 2010

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In The

Supreme Court of the United States

IAN AULDEN CAMPBELL,

Petitioner,

v.

ROY A.COOPER, III; FREDERICK HUBBARD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

IAN AULDEN CAMPBELL, Pro Se
P.O. Box 2405
Marion, NC 28752

QUESTION PRESENTED

Petitioner was convicted by a jury of First Degree Murder. However, during opening statements trial counsel breached Attorney-Client Privilege by revealing that the Petitioner lied to him about his involvement in the crime up until just before the start of jury selection, thereby prejudicing the jury against the Petitioner. The North Carolina Appellate Court denied the Petitioner's Sixth Amendment claim of ineffective assistance of counsel and held that the Petitioner waived his right to claim privilege Ex Post Facto, by admitting both during direct and cross examination that he lied to his attorneys. Therefore there is no ineffective assistance claim because there was no breach.

The Federal District Court denied relief of the same issue but for a different reason entirely, holding that the document signed by the Petitioner authorizing Trial Counsel to enter a plea of not guilty to the charge of First Degree Murder but to plead to a lesser included offense, was a total waiver of all attorney-client privilege despite the clearly narrow scope and specific language of the document. The Fourth Circuit did not issue a Certificate of Appealability, citing failure to show cause.

QUESTION PRESENTED – Continued

The question presented is:

Does the entry of a not guilty plea to the charge of First Degree Murder, coupled with a limited declaration by the Defendant/Petitioner that he is guilty of a lesser included offense, by virtue of the fact that he was the "proximate cause" of the death in question, constitute a complete and total waiver of Attorney-Client Privilege? (See *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) holding declaration required to allow Trial Counsel to disclose confidential information) also (see *U.S. v. Aldman*, 68 F.3d 1495 (2d Cir. 1995); *In Re Grand Jury Subpoena*, 341 F.3d 331 (4th Cir. 2003) forbidding disclosure of confidential information), even though state law recognizes that a waiver is a partial waiver if absent any language contemplating a total waiver in the Defendant's/Petitioner's written declaration filed with the Court (see *State v. Taylor*, 327 N.C. 146, 393 S.E.2d 801 (1990)). If such a partial waiver does, as a collateral consequence, constitute a total waiver of Attorney-Client Privilege in such a context, then Trial Counsel is required to advise their client of such consequences (see *Jose Padilla v. Kentucky*, S. Ct. 08-651, 31 March, 2010 (2010 U.S. Lexis 2928) also see *Martin v. Rose*, 744 F.2d 1245 (6th Cir. 1994) holding that a failure to advise a client of the collateral ramifications of an otherwise limited declaration or waiver, when made in the full context of the client's situation, constitutes ineffective assistance if the failure falls outside prevailing professional norms).

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PETITION FOR WRIT OF CERTIORARI

Pro Se Litigant's pleadings are to be constructed liberally and held to less stringent standards than Formal Pleadings drafted by lawyers. If the Court can reasonably read Pleadings to state a valid claim on which litigation could prevail, it should do so despite failure to cite proper legal authority, confusion, legal theories, poor syntax and sentence construction or litigant's unfamiliarity with Pleading requirements. See *Boag v. MacDougall*, 454 U.S. 364, 70 L. Ed. 2d 551, 102 S. Ct. 700 (1982). See also *Haines v. Kerner*, 404 U.S. 519, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972); See *Green v. Branson*, 108 F.3d 1296 (10th Cir. 1997); *Simmons v. Abruzzo*, 49 F.3d 83 (2d Cir. 1995); *Fernandez v. U.S.*, 941 F.2d 1488 (11th Cir. 1991).

Now Comes Ian Aulden Campbell, Petitioner herein, Pro Se, and requests that this court issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review its decision filed March 4, 2010, denying the Petitioner a Certificate of Appealability and thereby affirming the district court's denial of the Petitioner's Habeas Corpus Petition.

OPINIONS BELOW

On 16 May, 2006, the North Carolina Court of Appeals issued an opinion finding no error in the Petitioner's conviction (*State v. Campbell*, 177 N.C.

App. 520, 624, S.E.2d 345 (2006), *disc. rev. denied*, 360 N.C. 578, 635 S.E.2d 902 (2006).

On 5 November, 2007, the Petitioner filed a Habeas Corpus Petition in United States District Court for the Eastern District of North Carolina. On 11 September, 2008, Hon. Terrence W. Boyle conducted a hearing for oral argument on the Motion for Summary Judgment. On 16 September, 2008, Judge Boyle granted Respondents' motion for Summary Judgment (Appendix C). On 26 September, 2008, Petitioner filed a motion to alter or amend Judgment. On 16 July, 2009, Judge Boyle denied the motion. (Appendix B). Petitioner filed Notice of Appeal 6 August, 2009, (*case 5:07-HC-2201-BO*).

On 4 March, 2010, the Fourth Circuit Court of Appeals dismissed by unpublished Per Curium Opinion the Appeal in case No. 09-7468 (Appendix A). The Petitioner filed a Motion for Rehearing En Banc, Pro Se, and late, which was denied as untimely despite failure of Appellate Counsel to notify Petitioner of the option to appeal and the deadlines for same. (Appendix F).

JURISDICTION

The Fourth Circuit of Appeals issued an unpublished opinion 4 March, 2010, denying a Certificate of Appealability (Appendix A). This Petition is timely filed and the jurisdiction of this Court is invoked

pursuant to 28 U.S.C. § 1254 and Supreme Court Rules 10(a), (b), (c).

CONSTITUTIONAL OR LEGAL AUTHORITY

The Fifth Amendment provides in pertinent part " . . . Nor shall be compelled in any circumstances to be a witness against himself, nor be deprived of life, liberty, or property without due process of law" (Appendix G).

The Sixth Amendment provides in pertinent part "In all criminal prosecutions the accused shall enjoy a right to . . . " " . . . have the assistance of counsel for his defense" (Appendix G).

The Fourteenth Amendment provides in pertinent part " . . . nor shall any state deprive any person of life, liberty or property without Due Process of law, nor deny to any person within its jurisdiction the equal protection of the law . . . " (Appendix G).

The North Carolina State Bar Rules of Professional Conduct (27 NCAC 02 1.06) provide in pertinent part ". . . . a lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent. . . ." (Appendix H).

STATEMENT OF CASE

On 27 August, 2002, the Wake County North Carolina Grand Jury returned an indictment charging the Petitioner with the First Degree Murder of Heather Anne Domenie (*02-CRS-71304*). The charge was prosecuted capitally. The Petitioner entered a plea of Not Guilty.

The case came for trial at the 19 May, 2003 criminal term of the Wake County Superior Court, the Honorable W. Osmond Smith presiding.

The jury was instructed in First Degree, Second Degree and Manslaughter on 13 June, 2003. The jury returned a verdict of Guilty of First Degree Murder. On 16 June, 2003, the Jury returned a verdict finding no aggravating factors and recommended Life Imprisonment Without Parole. The Petitioner was sentenced in accordance with the jury's recommendation.

The Petitioner timely appealed his conviction in the North Carolina Court of Appeals. The Petitioner was found indigent by the State Courts on 16 May, 2006. The North Carolina Court of Appeals issued its decision reported as *State v. Campbell supra*. The North Carolina Supreme Court affirmed this conviction. The Court of Appeals ruled that the Petitioner was not denied effective assistance of counsel when Trial Counsel told the jury, in opening statements, matters that were confidential and covered by Attorney-Client Privilege because

(" . . . Defense counsel's mention in the opening statement that the defendant had lied to his attorney was incidental to this theme." [i.e., Defense strategy] Appendix D).

The Petitioner timely appealed to the United States District Court for the Eastern District of North Carolina on 5 November, 2007. (*5:07-HC-2201-BO*). On 11 September, 2008 Hon. Terrence W. Boyle (Hereafter Boyle) conducted a hearing for oral arguments on Motion for Summary Judgment. On 16 September, 2008, Boyle ordered Respondents' motion granted (Appendix C). Boyle contends that the declaration presented to the court is both a waiver of any privilege and a partial waiver. (Appendix I).

On 26 September, 2008, the Petitioner filed a motion to alter or amend Judgment. On 16 July, 2009, Boyle denied the Petitioner's motion on the grounds that no new argument was made. Petitioner filed Notice of Appeal on 6 August, 2009.

This matter was appealed to the Fourth Circuit. On 4 March, 2010, the Fourth Circuit issued a Judgment denying a Certificate of Appealability (*Case 09-7468*) (Appendix A). Petitioner's Appellate Counsel failed to advise the Petitioner of the option to apply for a Rehearing/Rehearing En Banc. The Petitioner discovered this on his own and filed a late motion, Pro Se. On 29 April, 2010 this motion was denied as untimely. (Appendix F).

STATEMENT OF FACTS

This case involves the Petitioner and the death of his fiancée Heather A. Domenie. After being confronted by the victim about an affair with another woman, a fight ensued resulting in the accidental death of the victim. Before trial, the Petitioner authorized counsel to disclose that he was the "proximate cause" of the victim's death, nothing more. (Appendix I). However, during opening statements Trial Counsel exceeded his authorization and disclosed that the Petitioner lied to him about the night in question until just before the start of the trial, irreparably prejudicing the jury against the Petitioner (Appendix K). The jury found the Defendant guilty of First Degree Murder. Further factual background is provided in the Court of Appeals opinion. (Appendix D).

REASONS FOR GRANTING THE WRIT

I. Overview of Governing Constitutional Law

This Court should grant the Petition to resolve a conflict between a decision of the Fourth Circuit and decisions of this Court over a Defendant's right to Attorney-Client Privilege, how it may be waived, and the right to be informed that another action, may as a collateral consequence, constitute a total waiver of Attorney-Client Privilege.

An ineffective assistance of counsel claim must meet the two part test established by *Strickland v.*

Washington, 466 U.S. 668 (1984): (1) Deficient performance, that counsel's performance fell below an objective standard of professional reasonableness, and (2) Prejudice, that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" *Strickland*, 466 at 694. The Quantum of Proof required is less than a preponderance of the evidence "[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case". 466 U.S. at 693.

Alternatively, the Supreme Court also recognizes that in certain cases, Per Se Error may exist in "circumstance that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified". *U.S. v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657, 667 (1984).

Furthermore it was established and it should be noted that in *Murray v. Carrier*, 477 U.S. 478, 91 L. Ed. 2d 391, 106 S. Ct. 2639 (1986) a single error may constitute ineffective assistance of counsel. This is relevant because excepting the breach of Attorney-Client Privilege, Trial Counsel's performance was in keeping with professional norms. This however does not excuse the breach (error) or "average it across the trial" making it less significant than it was. (See *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991) evaluation of conduct during discreet portions of a trial).

II. Conflict In The Lower Courts

The Lower Courts, North Carolina Court of Appeals and the Federal District Court found that counsel did not breach Attorney-Client privilege but for vastly different reasons. This was done in contravention to not only North Carolina Statutes but precedent from both within and without the Fourth Circuit. The Fourth Circuit Court of Appeals agreed with the Lower Courts in so far as they refused to issue a Certificate of Appealability thus requiring the U.S. Supreme Court's guidance to resolve these discrepancies pursuant to Supreme Court Rule 10(a) and 10(b).

Likewise, as a matter of first impression pursuant to Rule 10(c), this court must establish clear and unequivocal formats and language for the waiver of Attorney-Client Privilege so that regardless of the parties involved, at drafting or upon later review, the waiver's boundaries would always be drawn the same. As this is a matter with the potential to effect every Attorney-Client Relationship in the land, and not just this case, it is a matter which falls squarely within the purview of this court.

A. North Carolina Court of Appeals

The North Carolina Court of Appeals erred in finding that the comments made by Trial Counsel in opening statements were in keeping with trial strategy and therefore allowed because once the Petitioner took the stand and corroborated the

remarks he effectively waived his right to complain thereafter (*State v. Campbell supra*).

It is a given that for any case there are a multitude of possible defense strategies. To attack Trial Counsel's choice therefore is a high hurdle to overcome. In this case questioning the choice and/or quality of strategy with respect to an ineffective assistance claim is not necessary because it is the legal authority, or rather lack thereof, on which one specific defining strategic act is based which is in question. If Trial Counsel didn't have the legal authorization to pursue its chosen strategy then the strategic decision most certainly cannot be used to justify specific acts.

In fact the choice to pursue a strategy from which they were legally barred constitutes Per Se Error under *U.S. v. Cronic supra*. In and of itself, the North Carolina Court of Appeals Opinion of May 16, 2006 (Exhibit D) supports this because, if as that court claimed, the waiver was received when the Petitioner took the stand, Trial Counsel's strategy was illegal for the entire presentation of the State's case (see *Deluca v. Lord*, 77 F.3d 578 (3rd Cir. 1986) which held "Trial counsel's ineffective assistance claim will stand even if a well intended lawyer earnestly pursues a strategy that is objectively unreasonable under professional norms and results in prejudice to the defendant)".

If further investigation is required, the Eleventh Circuit has established a standard which needs be applied in this case. *Horton v. Zant supra* established

that an attorney's performance is to be evaluated during discreet portions of a trial without regard to their performance at any other points during trial. Using this standard one need only review the "discreet portion" of Trial Counsel's opening statement to explore the issue at hand. The issue then becomes not a question of the relative quality of the strategy selected by Trial Counsel, but rather one of did Trial Counsel have the authorization to make the following statements:

> (So I'm over there on Sunday the evidence will show and he's lying to everybody. Everybody. Well it goes on for months, months and months.)

(Trial Transcript p. 1289, Appendix K).

> And
>
> (It's not until April – April – five weeks from the beginning of Jury selection that after being under enormous pressure from his family and from his lawyers and everybody else that care anything about him, he tells us what he did, and what happened.)

(Trial Transcript p. 1290, Appendix K).

As a matter of law all confidential communications made by a client to his attorney based on the Attorney-Client Privilege are "Privileged and may not be disclosed". *In Re Investigation of the death of Miller,* 357 N.C. 316, 328, 584 S.E.2d 772, 782 (2003); *U.S. v. Aldman,* 68 F.3d 1495 (2d Cir. 1995); *In Re Grand Jury Subpoena,* 341 F.3d 331 (4th Cir. 2003)

forbids disclosure of information gained as a result of Attorney-Client Privilege. Even so, it is also recognized that "Privilege belongs to the defendant and may be waived by him." *State v. Bronson*, 333 N.C. 67, 76, 423 S.E.2d 772, 777 (1992); *State v. Taylor*, 327 N.C. 146, 393 S.E.2d 801 (1990) privilege may be waived totally or partially. However at the time of the event in question there had been no waiver. The North Carolina Court of Appeals even recognized this fact but claims that some future event excuses Trial Counsel's conduct. This flies in the face of not only the laws and precedents of the Fourth Circuit, but her sister circuits as well; involving an unreasonable application of clearly established Federal Law, as determined by the Supreme Court of the United States. This determination represents a gross abuse of discretion by this court.

The knowledge that the Petitioner lied to his lawyers was not in the public domain at this point in the trial. With only two possible sources, and given the Petitioner had not yet taken the stand, Trial Counsel's breach was the only possible source of the information and once divulged there was no taking it back. The bell could not be unrung, and the Petitioner was left with no choice when questioned under oath but to corroborate the statement or perjure himself, a clear situation of duress. Trial Counsel, through their actions, effectively forced the corroboration which the Court subsequently used as basis for determining a waiver of confidentiality (Exhibit D). A circular argument at best. Thus any future actions by the

Petitioner are moot and therefore cannot be used to justify Trial Counsel's action.

On an even more fundamental level, Trial Counsel's conduct can be proven to be a breach using the State Bar Rules; *27 NCAC 02 Rule 1.06(a)* (Appendix H) which states:

> A lawyer shall not reveal any information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or disclosure is permitted by paragraph (b).

> Since no claim has ever been made that the disclosure was impliedly authorized or permitted by paragraph (b) everything rests on the concept of informed consent. This is defined by the State Bar rules in *27 NCAC 02 Rule 1.0(f)* (Appendix J) as:

> "Informed consent" denotes the agreement of a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation to the circumstances.

In this case, the "consent" is in the form of the declaration signed by the Petitioner and presented to the Court (Appendix I). Clearly no such consent had been granted for the disclosure, a fact the North Carolina Court of Appeals agrees with, citing waiver by subsequent testimony. As the definitions don't contemplate waiver after the fact, (note "proposed

course" above) Trial Counsel is by definition in violation of *27 NCAC 02 Rule 1.06* and therefore breach of Attorney-Client Privilege, by its own definition.

Given that Attorney-Client Privilege is "One of the oldest most revered in the law" there is absolutely no excuse for any member of the Bar in this country not to be fully aware of the rules surrounding "Privilege" and be extremely diligent in their observance. *Martin v. Rose supra* held that Trial Counsel's tactics can constitute ineffective assistance if they fall outside the wide range of professionally competent assistance or the prevailing professional norms. As in the case where professional norms are to comply with State Bar rules, the violation is apparent.

The Petitioner contends that this error is so serious as to meet the requirement for a Per Se Error under *U.S. v. Cronic supra.* Failing this, however, one may still use this error by Trial Counsel to satisfy the first prong of the *Strickland Test.* It is clear that the North Carolina Court of Appeals rulings on this matter are not only inconsistent as a matter of law and precedent but are in conflict with precedents outside of the Fourth Circuit, thus involving an unreasonable application of Federal Law as determined by the Supreme Court of the United States.

B. Federal District Court

The Federal District Court erred in their finding that there was no breach of Attorney-Client Privilege in case *5:07-HC-2201-BO* and not only does their finding conflict with established precedent case law, but it also conflicts with itself from one sentence to the next.

III. Petitioner's Declaration as a Total Waiver of Attorney-Client Privilege

On page 9 of Boyle's order dated September 16, 2008 (Appendix C) it states:

> It is clear from the record that any privilege prior to trial was waived by the Petitioner as part of the trial strategy.

The key words in this statement "ANY PRIVILEGE" ensure this position is supported by neither the law nor the facts in this case.

The relevant North Carolina precedent case law is very clear with respect to this issue, and both the North Carolina Court of Appeals and Federal District Courts have failed to acknowledge it and follow it. In order for Trial Counsel to concede guilt of any offense and/or breach Attorney-Client Privilege, they must get the Defendant's specific informed consent. *State v. Harbison*, 315 N.C. 175, 377 S.E.2d 504 (1985); *U.S. v. Aldman supra*; *27 NCAC 02 Rule 1.06* (Appendix H).

This consent was in the form of the Declaration Document (Appendix I) which was filed with the Court before jury selection and represents Trial Counsel's only release from Attorney-Client Privilege. Furthermore, it is established law that a Defendant may waive Attorney-Client Privilege to some matters and not others. *State v. Taylor supra*. Given that the scope and language of the document are narrow and clear, one must conclude based on the precedent above, the waiver allowed Trial Counsel to admit the Petitioner's guilt of a lesser included offense and nothing more.

If Trial Counsel had wanted more latitude to discuss what would normally be considered privileged information, it was their responsibility to ask for it. It could and should have been contemplated in the document which Trial Counsel drafted for signature by their client. As members of the Bar, the onus was on Trial Counsel to see that they had the authorization (consent) to act as they did, something which they did not have. (See Section II(A)'s examination of 27 NCAC 02 Rule 1.06 for additional support).

Should this Court disagree with the Petitioner, and find that the Declaration did, as a collateral consequence, constitute a total waiver of Attorney-Client Privilege then Trial Counsel was required to advise the Petitioner of this fact before he signed the Declaration and presented it to the Court effectively pleading guilty to a charge of murder less than First

Degree, see *Padilla v. Kentucky supra*, but at least Involuntary Manslaughter.

Failure to do so deprived the Petitioner of the ability to make a fully informed decision to enter a guilty plea in a particularly complicated situation, as the Petitioner both pled guilty and went to trial. The existence of such a waiver potentially exposed the Petition to the adverse consequence of anything shared with Trial Counsel in confidence, and would therefore play a pivotal role in the Petitioner's decision to sign such a document. (See *Boykin v. Alabama*, 395 U.S. 238 (1969); *Bryant v. Cherry*, 687 F.2d 48 (4th Cir. 1982), *cert. denied*, 459 U.S. 1073. Holding a guilty plea must be made knowingly, voluntarily and intelligently, *Mabry v. Johnson*, 104 S. Ct. 2543, 2547 (1984). Furthermore, the Fourth Circuit has found that erroneous advice, in this case failure to advise as to the consequences of a guilty plea, constitutes ineffective assistance. (See *Strader v. Garrison*, 11 F.2d 6163 (4th Cir. 1979); see also *Ostrader v. Green*, 46 F.3d 347 (4th Cir. 1995). Holding that erroneous advice on a collateral consequence was grounds for relief).

In either case, Boyle's finding that the Declaration signed by the Petitioner was a waiver of " . . . any privilege prior to trial" or Trial Counsel's failure to disclose the waiver of Attorney-Client Privilege as a collateral consequence of the Declaration, the Petitioner is entitled to relief. In the first case, Boyle's decision is clearly an error of fact and law, and a position never addressed by the North Carolina Court

of Appeals or claimed by the Respondents' Counsel. In the second case Trial Counsel failed to advise the Petitioner of the collateral consequence of the Declaration he filed, which would have had a significant influence or impact on his decision to make the Declaration.

Therefore Trial Counsel's conduct clearly falls outside of prevailing professional norms and standards (*Martin v. Rose supra*). The Petitioner contends that the errors are so prejudicial as to meet the requirements under *U.S. v. Cronic supra* as Per Se Error. Failing this, one may still use it to meet the first prong on the *Strickland Test* (*Strickland v. Washington supra*). In failing to address this matter the Court clearly abused its discretion involving unreasonable application of Federal Law as established by the Supreme Court of the United States.

IV. Declaration Establishes an Understanding Between Petitioner and Trial Counsel

On Page 9 of Judge Boyle's September 16, 2008 Order (Appendix B) it states:

> The declaration establishes the understanding between petitioner and counsel that the defense would concede certain inculpatory facts to present a defense acknowledging some 'wrong doing' but not premeditation and deliberation.

The Petitioner agrees that this is exactly what the declaration does. In fact, that is all it does as this excerpt describes the entire scope of the waiver agreed to by the Petitioner.

Blacks Law Dictionary (7th Edition) defines "wrong-doing" as a violation of the law i.e. crime. Boyle further clarifies this interpretation with the words ". . . . But not premeditation and deliberation", clearly referring to the crime of murder. Given this interpretation by Boyle there is but one relevant question, and that is, what does any information about the nature, tenor, or personal feelings about and interactions between Trial Counsel and the Petitioner have to do with the "wrong-doing" (crime) described above? Absolutely nothing.

Furthermore, examining the Declaration itself, specifically bullet #4 (Appendix I) provides the clear and indisputable proof of the intended scope of the "inculpatory facts" which the Petitioner was waiving privilege to. That the Petitioner "proximately caused her death".

4. "That the defendant admits that he assaulted Heather Anne Domenie on July 25, 2002 and that his assault upon her proximately caused her death. The defendant acknowledges his responsibility for Heather Domenie's death on July 25, 2002 in Wake County."

Because by definition all information not released through informed consent remains protected by privilege, Trial Counsel exceed the scope of the

waiver, an act constituting, by its very definition, Ineffective Assistance of Counsel.

The fact that the Petitioner did not trust Trial Counsel enough to confide the truth to him says a lot about their relationship, but it has zero to do with the crime. Thus this information would fall definitely outside of the waiver signed by the Petitioner and as defined by Boyle in his Order and should therefore still have been protected by privilege. From this perspective there can be no question that Trial Counsel breached Attorney-Client Privilege, which falls outside of professional norms and prevailing standards of practice (*Martin v. Rose supra*). The Petitioner contends that this breach (error) is so serious as to meet the requirement of Per Se Error under *U.S. v. Cronic supra*. Failing, this, however, one may still use this error by Trial Counsel to satisfy the first prong of the *Strickland Test*. (*Strickland v. Washington supra*).

V. Conflict within Federal District Courts Own Order Regarding the Waiver

Page 9 of Boyle's Order dated September 16, 2008 (Appendix C) is not only inconsistent with the law but confusing and directly contradicts itself in the span of five sentences. In one sentence Judge Boyle states that the Declaration (Appendix I) is a waiver of "ANY" Attorney-Client Privilege (see argument II.) Then four sentences later, in the next paragraph, he defines the scope of the waiver, narrowly, as " . . .

Acknowledging some 'wrong-doing' . . . " (see argument III.)

Which is it? Given that logic dictates that both cannot be true, it is blatantly obvious that Judge Boyle's Order is fatally flawed and cannot be allowed to stand. This says nothing of the fact that neither position is supported by the law or facts in this case. This order violates the Petitioners rights to Due Process and Equal Treatment under the law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments. It is clearly an abuse of this Court's discretion and should not be allowed to stand as it includes an unreasonable application of clearly established Federal Law as determined by the Supreme Court of the United States.

VI. Does Not Validate or Contradict North Carolina Court of Appeals Opinion

In his Order of 16 September, 2008, Judge Boyle only mentions the North Carolina Court of Appeals in two places outside of procedural history. The first was to accept their summary of the facts of the case citing *State v. Campbell*, 177 N.C. App. at 521-25. The second is on the final line of Section B on page 9.

> Accordingly, Petitioner is unable to show that the State Court Decision was contrary to clearly established Federal Law.

This statement was made without any basis, support, or justification at the end of Judge Boyle's own contradictory (of itself) opinion.

Given that Judge Boyle used his own reasoning to arrive at the same conclusion as the North Carolina Court of Appeals, one can only guess as to whether or not this higher Court agreed with the argument supporting the North Carolina Court of Appeals opinion or not. Thus denying the Petitioner the benefit of the knowledge of whether or not it would be necessary to attack this argument in subsequent appeals.

In plain language, it is unclear whether the Federal District Court found the North Carolina Court of Appeals decision with respect to their finding that the Petitioner's testimony excused Trial Counsel's breach after the fact to be valid even though it violates clearly established law and the facts of this case. Given Boyle's own fatally flawed opinion and lack of proper comment on the lower court's opinion this statement further violates the Petitioner's rights to Equal Treatment and Due Process as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the Constitution involving an unreasonable application of clearly established Federal Law as established by the Supreme Court of the United States.

VII. Summary of Arguments

Based on the proceeding sections summarized below, it is clear that the Federal District Courts findings are an error with respect to both fact and law and should not stand.

Boyle's first position that "Any Privilege" was waived prior to trial, and therefore there was no breach, is an error of fact and law. See III. Furthermore, one can make the plain language argument that if under North Carolina Law a declaration is a complete waiver of Attorney-Client Privilege protections, it would be a standard statement used in all cases by all courts as a matter of administrative procedure or control to ensure the protection of Equal Treatment and Due Process rights.

Boyle's second position that privilege was waived with respect to the "wrong-doing" is correct and supported by the facts. However, the disclosure of information related to the nature, tenor, feelings about or relationship between Trial Counsel and the Petitioner is clearly outside of the scope of the waiver. The determination that there was no breach of Attorney-Client Privilege is an error of fact and law. See III.

The fact that Boyle's Opinion contradicts itself from sentence to sentence invalidates his opinion as the waiver cannot be total and partial at the same time, see IV., thus making the Order not only erroneous but on abuse of discretion denying the Petitioner his Constitutionally protected rights to Due Process and Equal Treatment under the law.

The fact that Boyle fails to directly address the Lower Courts ruling denies the Petitioner's Right to Due Process and Equal Treatment by failing to note if

the Lower Courts argument is valid or not. See V. Even though Boyle arrived at the same conclusion he took a totally different path thereby making the Order not only erroneous but an abuse of discretion by this Court.

While individually the arguments above (see III., IV., and V.) clearly support the Petitioner's claims, taken collectively there can be no doubt that the position taken by Boyle was not only an error of fact and law but also an abuse of this Court's discretion and should not be allowed to stand, as it involves an unreasonable application of clearly established Federal Law as established by the Supreme Court of the United States.

A. Fourth Circuit Court of Appeals

The Fourth Circuit erred when they failed to issue a Certificate of Appealability Case *09-7468*, (see Appendix A) citing the absence of "A substantial showing of the denial of a Constitutional right." 28 U.S.C. § 2253(c) (2006). It was noted that one may satisfy this standard

> By demonstrating that reasonable jurists would find that any assessment of the constitutional claim by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable.

Citing *Miller-E.L. v. Cockrell,* 537 U.S. 322, 336-38 (2003); *Slack v. McDaniel,* 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683-84 (4th Cir. 2001).

Based on this standard, the question in general to be put to the "Reasonable Jurists" is: Was the Lower Courts finding that there was no breach of Attorney-Client Privilege and therefore no possible claim of a violation of Constitutional right to Effective Assistance of Counsel a correct determination of the facts and the law? If the answer is NO, and it is determined that there was a breach then the merits of this case must then be judged using either the *Cronic* or *Strickland* standards. Failing the use of *Cronic*, the *Strickland Test*, must be invoked to evaluate the impact of Trial Counsel's remarks, made during the opening statements, which are a matter of record and not in dispute.

The Petitioner submits the following for assessment by the "Reasonable Jurist" standard as required by the Fourth Circuit Court of Appeals noting that while he contends that all arguments meet the required standard, any of them alone is enough to meet the requirements for review.

The Petitioner submits that a "Reasonable Jurist"

I) Would not agree with the North Carolina Court of Appeal's argument that Trial Counsel's remarks could be justified and the breach of Attorney-Client Privilege excused by the Petitioner's corroboration under duress in the Trial, because but for

Trial Counsel's breach which forced the Petitioner to confirm these facts while testifying or risk looking "evasive" or "incapable of ever telling the truth", this information would never have come to light. Therefore either the *Cronic* or *Strickland* standards must be applied to test for effective assistance of counsel, a Constitutional right.

II) Would not agree that the Declaration (Appendix I) signed by the Petitioner was a waiver of "Any Privilege" as asserted by Boyle (Appendix C). In further support of this, the Petitioner contends that a "Reasonable Jurist" would not believe that a defendant would waive all right to Attorney-Client Privilege in a Capital Murder case, therefore Trial Counsel breached Attorney-Client Privilege. As a result either the *Cronic* or *Strickland* standard must be applied to test for Effective Assistance of Counsel, a Constitutional right.

III) Would agree that when you interpret the scope of the waiver as ". . . . inculpatory facts to present a defense acknowledging some 'wrong-doing' . . . " (Boyle's decision Appendix C) that this would not include information about the nature, tenor, or personal feelings about or between Trial Counsel and the Petitioner when their relationship did not begin until after the "wrong-doing" in question. Therefore the remarks fell outside the scope of the waiver, a breach of Attorney-Client Privilege requiring the application of either *Cronic* or *Strickland* standard to test for effective assistance of counsel, a Constitutional right.

IV) Would using the defining law for Attorney-Client Privilege *27 NCAC 02 1.06* (Appendix H) which holds that all information not specifically excluded remains protected, view the declaration document in the most limited terms as the onus was on Trial Counsel, a member of the Bar, to ensure that he had the legal authority/authorization to pursue his chosen trial strategy in the manner he did. This is distinctly different from claiming a poor choice of strategy. Therefore because there was a breach of Attorney-Client Privilege either the application of *Cronic* or *Strickland* standard is required to test for effective assistance of counsel as a Constitutional right.

V) Would find that Boyle's decision which, aside from conflicting with State and Federal Law and precedent, contradicts itself within the span of five sentences failed to meet any sort of judicial standard and therefore violated the Petitioner's Constitutional right to Due Process and Equal Treatment thus entitling the Petitioner to further review.

Based on the application of the standard established by the Fourth Circuit Court of Appeals to items (I)-(V) above it is clear that the Petitioner was erroneously denied the Certificate of Appealability and is entitled to further review as there was clearly an unreasonable application of Federal Law as established by the Supreme Court of the United States.

B. Prejudice

Having established that there was a breach of Attorney-Client Privilege one must now examine the impact of this professional error. Failing a successful application of *Cronic*, the *Strickland* standard applies.

Once Trial Counsel placed the information in the public domain, the bell could not be unrung so what choice did the Petitioner have but to concede it in his testimony? Lying under oath was not an option, and neither was trying to avoid corroborating it for fear of appearing "evasive". The Petitioner was on trial for his life, literally, and needed the jury to believe his testimony. This was the crucial pivoting point for the whole case.

While the State had overwhelming evidence that the Petitioner was responsible for the death in question, its proof that it was an act of First Degree Murder was quite thin. The State tried to put forth monetary gain as evidence of premeditated murder, a claim that she was killed for the insurance money. The jury's verdict in the penalty phase of the trial finding that the murder was not committed for pecuniary gain makes it clear that that the jury did not find this motive to be proven by the State. In fact, during the trial it was established that the insurance policy the Petitioner was accused of trying to collect on had never been approved or issued by the insurer, a fact the Petitioner was aware of. Absent this, there was virtually no evidence of any reason why the

Petitioner would commit this act intentionally. There was no evidence of prior violent acts or spite or ill will. All of the evidence was, that despite the affair, the Petitioner genuinely cared about the victim and had no reason to want her to suffer harm. In light of the weakness of the State's case that the Petitioner formed specific intent to kill after premeditation and deliberation, Trial Counsel's professional errors are peculiarly likely to have had an effect on the outcome. How could it not, if the one person whom the Petitioner could tell the truth to, without adverse consequence tells the jury the Petitioner lied to him over a period of months? How could one expect the jury to believe the Petitioner after this revelation? Prejudice is clear.

But for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. Should this fail to meet the *Cronic* standard it would meet the second prong requirement under *Strickland v. Washington supra*.

CONCLUSION

As a matter of first impression definitive guidance is required from this Court to set the standard for the waiver of Attorney-Client Privilege (S. Ct. Rule 10(c)). Furthermore this guidance is required to resolve conflicts between the circuit courts and within the Fourth Circuit itself (S. Ct. Rule 10(a), 10(b)).

Attorney-Client Privilege, while not a Constitutional right, is still a cornerstone of American Jurisprudence. Without the guarantee of this protection from outside intrusion, the judicial system cannot possibly function. Likewise, without the confidence in their attorney to honor this privilege, the judicial system will similarly cease to function. Recognizing that there may be specific instances where it is in a defendant's interest to allow counsel to disclose privileged information, this decision must remain with the defendant and not counsel.

Furthermore, any such agreements must not only be transparent but specific in terms of intent, scope, and clear and unequivocal language, such that any and all persons, with or without legal training, would draw the boundaries of any waiver identically each and every time, regardless whether it is at point of drafting or upon later review. As such, this Court needs to establish a Bright-Line Rule for the waiver of Attorney-Client Privilege be it partial or total. As this is a matter with the potential to affect every Attorney-Client relationship in the land it is a matter which falls squarely within the purview of this court.

In this case the Petitioner was denied his right to effective assistance of counsel when Trial Counsel told the jury confidential communications that the Petitioner did not waive privilege to or otherwise consent to. This professional error was grossly prejudicial, entitling the Petitioner to relief. However, the Appellate Courts in direct conflict with precedents set by other North Carolina Courts, and those of other

United States Courts of Appeals, have failed to grant the entitled relief.

Furthermore, the Federal District Court's ruling which not only contradicted State and Federal Law and precedent but itself as well, violated the Petitioner's rights to Equal Treatment and Due Process under the law as guaranteed by the Constitution and therefore should not be allowed to stand as it involves an unreasonable application of clearly established Federal Law as determined by the Supreme Court of the United States.

The Fourth Circuit's failure to correct these errors makes it a matter for this Court.

The Petition of Writ of Certiorari should be granted.

Respectfully submitted,

IAN AULDEN CAMPBELL, PRO SE
P.O. Box 2405
Marion, N.C. 28752

Dated the 16th day of July 2010

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-7468

IAN AULDEN CAMPBELL,

Petitioner – Appellant,

v.

ROY A. COOPER, III; FREDERICK HUBBARD,

Respondents – Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5:07-hc-02201-BO)

Submitted: February 23, 2010

Decided: March 4, 2010

Before WILKINSON, KING, and DAVIS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Ann Bach Petersen, GLOVER & PETERSEN, PA, Chapel Hill, North Carolina, for Appellant. Clarence Joe DelForge, III, Assistant Attorney General, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ian Aulden Campbell seeks to appeal the district court's orders denying relief on his 28 U.S.C. § 2254 (2006) petition, and denying reconsideration of that order under Fed. R. Civ. P. 59(e). The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that Campbell has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the

materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:07-HC-2201-BO

IAN AULDEN CAMPBELL, Petitioner, v. ROY COOPER, III, et al., Respondents.	)	ORDER (Filed Jul. 16, 2009)

Petitioner, a state inmate, petitioned the court for writ of habeas corpus pursuant to 28 U.S.C. § 2254. After a hearing on the summary judgment motion, in an order filed on September 16, 2008, the court granted respondent's motion for summary judgment and dismissed the petition.[1] Petitioner has now filed a motion to alter or amend judgment (D.E. 16) pursuant to Fed. R. Civ. P. 59(e). As explained below, the motion to alter or amend judgment is denied.

Rule 59(e) permits a court to alter or amend a judgment. *See* Fed. R. Civ. P. 59(e). The decision whether to amend or alter a judgment pursuant to

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[1] The underlying facts and procedural history of the case are set forth in the September 16th order (D.E. #13).

Rule 59(e) is within the sound discretion of the district court. *See, e.g., Hughes v. Bedsole,* 48 F.3d 1376, 1382 (4th Cir. 1995). Courts have recognized three reasons for granting a motion to alter or amend a judgment under Rule 59(e): (1) to accommodate an intervening change in controlling law; (2) to account for the availability of new evidence not previously available; or (3) to correct clear error of law or prevent manifest injustice. *See, e.g., Hutchinson v. Staton,* 994 F.2d 1076, 1081 (4th Cir. 1993). Consequently, "[a] Rule 59(e) motion is not intended to allow for reargument of the very issues that the court has previously decided," *DeLong v. Thompson,* 790 F. Supp. 594, 618 (E.D. Va. 1991), *aff'd,* 985 F.2d 553 (4th Cir. 1993), and is not "intended to give an unhappy litigant one additional chance to sway the judge." *Durkin v. Taylor,* 444 F. Supp. 879, 889 (E.D. Va. 1977). Therefore, to successfully persuade this court to alter or amend its judgment, petitioner must demonstrate that a recent change in the law, newly discovered evidence, or a clear error by this court merits such a change.

In the motion to alter or amend judgment, petitioner argues that this court's order contains errors of law and fact. In making the claim, petitioner's argument focuses on the waiver of petitioner in a two-page document filed with the state court prior to opening statements at trial. The two page document contained the written consent of petitioner to allow his trial lawyers to concede to the jury that he was the person who caused the death of Heather

Domenie and that he was guilty of some degree of homicide, but not premeditation and deliberation. Petitioner argues that "[i]t was a waiver . . . of a portion of his right to confidentiality – he waived his right to complain that his counsel was informing the jury that Petitioner was admitting his guilt to some lesser degree of homicide than first degree murder. It was nothing more." (D.E. # 16, p. 3) Specifically, petitioner argues that he did not waive his attorney-client privilege to allow his trial counsel to divulge the confidential information that he had lied to his trial counsel and others for the months leading to trial. (*Id.*, at 4)

It appears petitioner is trying to argue that the court is mistaken in holding the agreement to be a total waiver of the attorney client privilege for all matters discussed by petitioner with his counsel. Petitioner argues that because the North Carolina Court of Appeals never addressed any waiver as a result of the two page document signed by trial counsel and petitioner, and because respondent never claimed the document to be a waiver, this court's holding is incorrect.

This court specifically held that "[i]t is clear from the record that any privilege prior to trial was waived by the petitioner as a part of the trial strategy." (D.E. # 13, p. 9) The court summarized its holding as follows:

> Before the court is a declaration presented to the trial court on the first day of trial which

> is central to the issue. The declaration outlines the defense's strategy. The declaration sets out a clear and apparent waiver of the attorney-client privilege. The declaration establishes the understanding between petitioner and counsel that the defense would concede certain inculpatory facts to present a defense acknowledging some wrong-doing, but not premeditation and deliberation. Accordingly, petitioner is unable to show that the state court decision was contrary to clearly established law.

Id.

In asking the court to reconsider its judgment on this basis, petitioner does nothing more than re-assert arguments made previously in his petition and response to respondent's motion for summary judgment. "A Rule 59(e) motion is not intended to allow for reargument of the very issues that the court has previously decided." *DeLong*, 790 F. Supp. at 618. Therefore, this claim is without merit.

Accordingly, Campbell fails to demonstrate an intervening change in controlling law, to present new evidence previously not available, or to show a clear error of law that would support granting his Rule 59 motion. The motion to alter or amend judgment (D.E. 16) pursuant to Fed. R. Civ. P. 59(e) is DENIED.

SO ORDERED, this the 15 day of July 2009.

/s/ Terrence Boyle
TERRENCE W. BOYLE
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION
No. 5:07-HC-2201-BO

IAN AULDEN CAMPBELL, Petitioner, v. ROY COOPER, III, et al., Respondents.	)	**ORDER** (Filed Sep. 16, 2008)

Ian Aulden Campbell, a state inmate, petitioned the court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Now before the court is respondents' motion for summary judgment to which petitioner responded. On September 11, 2008, the court held a hearing on the pending motion for summary judgment. The matter is ripe for determination.

Background

On August 27, 2002, the Wake County Grand Jury returned an indictment charging petitioner with the murder of Heather Anne Domenie. The State of North Carolina prosecuted the murder charge capitally, seeking the death penalty. Petitioner pled not guilty to the charges. He was represented by Tommy Manning and James A. Crouch.

On May 19, 2003, the jury trial began in the case of *State v. Campbell*, No, 02 CRS 071304, in the Superior Court of Wake County. On that day, the defense filed a written declaration with the court by Campbell admitting "he assaulted Heather Anne Domenie on July 25, 2002 and that his assault upon her proximately caused her death." Pet., Attach. "Declaration of Defendant and Defense Counsel Regarding Trial" ¶ 4. The declaration indicated a defense strategy claiming defendant was not guilty of first-degree murder, but rather the lesser-included offense of homicide in violation of the North Carolina General Statutes. *Id.* ¶5. The declaration further contained Campbell's consent to pursue the defense admitting the assault and presenting evidence, including his own testimony disputing the State's contention of guilt of first-degree murder, but establishing guilt of a lesser-included offense of homicide other than first-degree murder. *Id.* ¶ 7.

At the conclusion of evidence in the first phase of the trial, the trial court instructed the jury on first-degree murder, solely on the theory of premeditation and deliberation, and on the lesser offenses of second-degree murder and voluntary manslaughter. On June 13, 2003, the jury returned a verdict finding petitioner guilty of first-degree murder. On June 16, 2003, the jury returned a verdict finding no aggravating circumstances and recommended a sentence of life imprisonment without parole. Petitioner was sentenced in accordance with the jury recommendation, life imprisonment without parole.

On May 16, 2006, the North Carolina Court of Appeals issued a published opinion finding no error. On August 17, 2006, the Supreme Court of North Carolina denied discretionary review. On appeal, petitioner was represented by Ann B. Petersen. Petitioner filed this federal habeas petition through Ann Petersen as well.

The North Carolina Court of Appeals summarized the facts from petitioner's trial as follows:

> The facts of this case are not in dispute, and we provide only those facts pertinent to resolution of the issues on appeal. Defendant killed his fiancee, Heather Domenie, on the night of 25 July 2002. Defendant had been having an affair with another woman, and he argued with Domenie about his affair on the night of her death. The fight escalated, and defendant grabbed the towel around her neck and strangled her. According to the medical examiners, Domenie died from asphyxia due to strangulation.
>
> After some time passed, defendant called the 911 emergency center, claiming his fiancee had choked herself with a tea towel and was not breathing. When the first responders arrived, he told them Domenie apparently had choked while he had been on an errand to the store. Shortly thereafter, defendant called two friends, and when they arrived, he told them Domenie had choked herself with a tea towel.

Defendant continued to give this account of Domenie's death to everyone with whom he spoke about the matter, including the emergency room doctor, the police, his life insurance agent, his family, the woman with whom he was having an affair, and his attorneys.

The police arrested defendant on 16 August 2002. He was indicted for first degree murder, and the charge was prosecuted capitally.

In April 2003, defendant admitted to his attorneys that he had strangled Domenie. At the start of the trial, on 19 May 2003, defendant filed a declaration with the court admitting "he assaulted Heather Anne Domenie on July 25, 2002 and that his assault upon her proximately caused her death." The declaration indicated a defense strategy claiming defendant was not guilty of first degree murder, but rather a lesser-included homicide with a correspondingly less culpable *mens rea*:

> The Defendant consents to his trial counsel pursuing, at trial, a course of defense which admits his assault upon Heather Anne Domenie, and plans to present evidence, including testifying in his own defense, and offering other evidence which he and his trial counsel contend will dispute the State's contention that he is guilty of First Degree Murder,

> but which will establish that he is guilty of a lesser-included offense of homicide other than First Degree Murder.

At trial, the defendant's counsel began his opening statement by acknowledging defendant had killed Domenie. Counsel then laid out the central issue in the case, claiming defendant did not kill Domenie "with malice or premeditation or deliberation" as the State contended, but instead had killed her "as a situational crime" without planning in advance. The defense theory of the case argued the killing "was a situational crime which resulted from a domestic situation which Ian had created, and that, as it evolved, it happened so swiftly and with such unexpected and explosive suddenness that all of his reason was suspended when he killed her." According to defense counsel, defendant's alibi was so unbelievable it demonstrated defendant had not premeditated or deliberated the killing:

> Well, Ian Campbell – and I'll give you the litany in a minute – the evidence is going to show that what he constructed to avoid getting caught and avoid getting detected and to avoid responsibility for what he had done will be, we're convinced, in your opinion, the most pathetic, miserable construct of an alibi in the history of criminal law.

Counsel then explained defendant's alibi that Domenie had "gone and choked herself with a tea towel" while he was running an errand, and told the jury that as it considered the evidence in the case they should "keep in mind how miserable it is, and pathetic, and consider that when you're deciding whether this thing was premeditated and deliberated upon, whether this killing was thought out in advance and planned."

Next, defense counsel previewed the evidence showing defendant lied to the first responders, to the police, and to his brother. Defendant kept telling the same lie, and he was "lying to everybody. Everybody. Well, it goes on for months, months and months." "Everybody" included his attorneys. Five weeks before the trial started, however, defendant broke down "under enormous pressure from his family and from his lawyers and everybody else that cares anything about him," and finally "[told] us what he did and what happened." The "pathetic" lie defendant kept telling pertained to whether defendant had the mental state for first degree murder:

> And you'll be able to judge his credibility and make a decision about whether you think that this was all the work of a planning, determined, master-mind or someone who was covering for something that – something terrible had happened to him and the pathetic

> efforts he made to cover it up. That will be your decision.
>
> And based on your determination of that will be a lead-in into your consideration of what offense of homicide Ian Campbell's guilty of.

According to the defense theory, defendant's "pathetic" lie indicated his killing of Domenie was not premeditated or deliberated, and therefore defendant was guilty of a lesser crime than first degree murder.

During the trial, defendant testified in his own defense. During direct examination, defendant admitted he had repeatedly lied:

Q: Well, Ian, can you tell the Court and jury how you began to and why you began to pursue the matter of the correspondence and discussions with the life insurance company about Heather's policy?

A: I was telling everybody the same lie, and my family and lawyers and people around me were believing me,. . . .

On cross examination, defendant again admitted lying to his attorneys:

Q: You lied to all the folks from the Cary Police Department that you have talked to, right?

A: Yes, sir, I lied to everybody that night and every time after that fact that I was questioned about that event.

Q: Okay.

A: I lied to my family, my lawyers and everybody.

In his closing argument, defense counsel returned to the theme of defendant's implausible lie. Counsel argued:

> And while we're talking about that and your determination of whether this was a premeditated and deliberated killing with motive, consider this, from a guy who is supposed to be smart and a planner and all that: If you were going to do something and plan on doing it very carefully, all the way back to buying insurance and everything else, why in the world would you put yourself in the house with your intended victim, screen every call that came in, admit no one to the house and then set yourself up as the only possible suspect? And then after all that careful planning and execution of this careful plan to eliminate this person in a premeditated and a deliberate way, then the best you could do after thinking on it all the way back to June with Ron Keever and everything else, come up with that 9-1-1 call. And the – I think we've just used the word before – pathetic explanation for what happened and the persistence

> afterwards, all the way up to almost the beginning of the trial, in denying that you had anything to do with this or trying to create evidence to show that you just couldn't have done it, if it was so well planned.
>
> Counsel summarized this theme: "If it had been premeditated, don't you know the story would have been better?"

State v. Campbell, 177 N.C. App. at 521-25.

DISCUSSION

A. Standard of Review

Summary judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Campbell's claim is governed by 28 U.S.C. § 2254(d), as modified by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104, 132, 110 Stat. 1214 (1996). Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000). A state court decision "involve[s] an unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. Additionally, there is no requirement the state court specifically cite United States Supreme Court cases as long as the ultimate decision is not contrary to, nor involves an unreasonable application of, clearly established federal law as determined by the Supreme Court. *See Bell v. Jarvis*, 236 F.3d 149, 157-158 (4th Cir. 2000); *see also Thomas v. Taylor*, 170 F.3d 466, 475 (4th Cir. 1999);

see also Weeks v. Angelone, 176 F.3d 249, 259 (4th Cir. 1999).

Only after a petitioner establishes that the state court's adjudication of his claims was "contrary to," or an "unreasonable application of" clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence, may a federal court proceed to review a state court judgment independently to determine whether habeas relief is warranted. *Rose v. Lee*, 252 F.3d 676, 690 (4th Cir. 2001). If the state court did not articulate the rationale underlying its adjudication, a federal habeas court must examine the record and the clearly established Supreme Court precedent to determine whether the state court's adjudication was contrary to, or involved an unreasonable application of, clearly established federal law. *Bell*, 236 F.3d at 158. If, however, the state court failed to adjudicate a properly presented claim, the federal court must review questions of law and mixed questions of law and fact *de novo*. *Fisher v. Lee*, 215 F.3d 438, 445 (4th Cir. 2000) (quoting *Weeks*, 176 F.3d at 258). Finally, the factual findings of the state court are presumed to be correct. 28 U.S.C. § 2254(e)(1). The petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Id.*

B. Campbell's Claim

One issue is raised in this court: Disclosure by trial counsel of confidential communications in which

petitioner, Ian Campbell, repeatedly lied to his attorneys was ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

"It is a well-settled principle of law that confidential conversations between a defendant and his counsel generally are protected by the attorney-client privilege, which affords the communications 'complete protection from disclosure.'" *United States v. Lentz*, 524 F.3d 501, 523 (4th Cir. 2008) (quoting *In re Grand Jury Subpoena*, 341 F.3d 331, 334 (4th Cir. 2003)). The privilege "is a creation of the common law, not the Constitution." *Smith v. Moore*, 137 F.3d 808, 819 (4th Cir. 1998) (quoting *Lange v. Young*, 869 F.2d 1008, 1012 n.2 (7th Cir. 1989)). "Federal habeas review is limited to 'violations of the United States Constitution or its law and treaties.'" *Smith*, 137 F.3d at 819 (quoting *Cooper v. Taylor*, 103 F.3d 366, 370 (4th Cir. 1996)). As such, "a mere violation of .. [the] attorney-client privilege would not warrant habeas relief." *Smith*, 137 F.3d at 819 (citing *Lange*, 869 F.2d at 1012 n.2 (noting that "[e]ven if a violation of the attorney-client privilege occurred this violation alone would be insufficient grounds for [habeas] relief")). Thus, one is only entitled to habeas relief if, as a result of the breach of the privilege, the Sixth Amendment is violated based on ineffective assistance of counsel. See *Smith*, 137 F.3d at 819-820.

That said, the issue of whether there was a breach of the privilege is essential to the determination of this petition. If there were no

breach, there is no need to look at the ineffective assistance issue, and the matter is concluded. If a breach did occur, then the court must inquire, whether counsel's performance deficient, and if so, was the deficiency prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Under North Carolina procedural rules, a direct appeal is limited to a review solely upon the record on appeal and the transcripts of the proceedings. N.C. R. App. P. 9(a). A review of the transcript and record before the North Carolina Court of Appeals affirms the appeal was in compliance with Rule 9(a). At issue here is a question of whether the trial attorney violated the petitioner's privileged communications with counsel prior to trial. It is clear from the record that any privilege prior to trial was waived by the petitioner as a part of the trial strategy.

Before the court is a declaration presented to the trial court on the first day of trial which is central to the issue. The declaration outlines the defense's strategy. The declaration sets out a clear and apparent waiver of the attorney-client privilege. The declaration establishes the understanding between petitioner and counsel that the defense would concede certain inculpatory facts to present a defense acknowledging some wrong-doing, but not premeditation and deliberation. Accordingly, petitioner is unable to show that the state court decision was contrary to clearly established federal law.

CONCLUSION

For the reasons stated above, respondents' motion for summary judgment is ALLOWED. SO ORDERED. This the 16 day of September 2008.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
UNITED STATES
DISTRICT JUDGE

APPENDIX D

All opinions are subject to modification and technical correction prior to official publication in the North Carolina Reports and North Carolina Court of Appeals Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the North Carolina Reports and North Carolina Court of Appeals Reports, the latest print version is to be considered authoritative.

NO. COA05-942

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA,

Plaintiff,

v.

Wake County
No. 02 CRS 071304

IAN AULDEN CAMPBELL,

Defendant.

Appeal by defendant from judgment entered 13 June 2003 by Judge W. Osmond Smith in Wake County Superior Court. Heard in the Court of Appeals 10 April 2006.

Roy Cooper, Attorney General, by Amy C. Kunstling, Assistant Attorney General, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for Defendant-Appellant.

MARTIN, Chief Judge.

Ian Aulden Campbell ("defendant") appeals from a judgment entered on a jury verdict finding him guilty of first degree murder. Defendant was sentenced to life imprisonment without parole. On appeal, defendant makes two arguments. First, defendant claims he received ineffective assistance of counsel at trial because his attorney informed the jury that defendant had initially lied to everyone, including his attorneys, regarding his involvement in the victim's death. Second, defendant argues the prosecution impermissibly shifted the burden of proof to defendant during closing arguments. We find no error.

The facts of this case are not in dispute, and we provide only those facts pertinent to resolution of the issues on appeal. Defendant killed his fiancée, Heather Domenie, on the night of 25 July 2002. Defendant had been having an affair with another woman, and he argued with Domenie about his affair on the night of her death. The fight escalated, and defendant grabbed the towel around her neck and strangled her. According to the medical examiners, Domenie died from asphyxia due to strangulation.

After some time passed, defendant called the 911 emergency center, claiming his fiancée had choked herself with a tea towel and was not breathing. When the first responders arrived, he told them Domenie apparently had choked while he had been on an errand to the store. Shortly thereafter, defendant called two friends, and when they arrived, he told them Domenie had choked herself with a tea towel.

Defendant continued to give this account of Domenie's death to everyone with whom he spoke about the matter, including the emergency room doctor, the police, his life insurance agent, his family, the woman with whom he was having an affair, and his attorneys.

The police arrested defendant on 16 August 2002. He was indicted for first degree murder, and the charge was prosecuted capitally.

In April 2003, defendant admitted to his attorneys that he had strangled Domenie. At the start of the trial, on 19 May 2003, defendant filed a declaration with the court admitting "he assaulted Heather Anne Domenie on July 25, 2002 and that his assault upon her proximately caused her death." The declaration indicated a defense strategy claiming defendant was not guilty of first degree murder, but rather a lesser-included homicide with a correspondingly less culpable *mens rea*:

The Defendant consents to his trial counsel pursuing, at trial, a course of defense which admits his assault upon Heather Anne Domenie, and plans to present evidence, including testifying in his own defense, and offering other evidence which he and his trial counsel contend will dispute the State's contention that he is guilty of First Degree Murder, but which will establish that he is guilty of a lesser-included offense of homicide other than First Degree Murder.

At trial, the defendant's counsel began his opening statement by acknowledging defendant had killed

Domenie. Counsel then laid out the central issue in the case, claiming defendant did not kill Domenie "with malice or premeditation or deliberation" as the State contended, but instead had killed her "as a situational crime" without planning in advance. The defense theory of the case argued the killing "was a situational crime which resulted from a domestic situation which Ian had created, and that, as it evolved, it happened so swiftly and with such unexpected and explosive suddenness that all of his reason was suspended when he killed her." According to defense counsel, defendant's alibi was so unbelievable it demonstrated defendant had not premeditated or deliberated the killing:

> Well, Ian Campbell – and I'll give you the litany in a minute – the evidence is going to show that what he constructed to avoid getting caught and avoid getting detected and to avoid responsibility for what he had done will be, we're convinced, in your opinion, the most pathetic, miserable construct of an alibi in the history of criminal law.

Counsel then explained defendant's alibi that Domenie had "gone and choked herself with a tea towel" while he was running an errand, and told the jury that as it considered the evidence in the case they should "keep in mind how miserable it is, and pathetic, and consider that when you're deciding whether this thing was premeditated and deliberated upon, whether this killing was thought out in advance and planned."

Next, defense counsel previewed the evidence showing defendant lied to the first responders, to the police, and to his brother. Defendant kept telling the same lie, and he was "lying to everybody. Everybody. Well, it goes on for months, months and months." "Everybody" included his attorneys. Five weeks before the trial started, however, defendant broke down "under enormous pressure from his family and from his lawyers and everybody else that cares anything about him," and finally "[told] us what he did and what happened." The "pathetic" lie defendant kept telling pertained to whether defendant had the mental state for first degree murder:

> And you'll be able to judge his credibility and make a decision about whether you think that this was all the work of a planning, determined, master-mind or someone who was covering for something that – something terrible had happened to him and the pathetic efforts he made to cover it up. That will be your decision.
>
> And based on your determination of that will be a lead-in into your consideration of what offense of homicide Ian Campbell's guilty of.

According to the defense theory, defendant's "pathetic" lie indicated his killing of Domenie was not premeditated or deliberated, and therefore defendant was guilty of a lesser crime than first degree murder.

During the trial, defendant testified in his own defense. During direct examination, defendant admitted he had repeatedly lied:

> Q: Well, Ian, can you tell the Court and jury how you began to and why you began to pursue the matter of the correspondence and discussions with the life insurance company about Heather's policy?
>
> A: I was telling everybody the same lie, and my family and lawyers and people around me were believing me,. . . .

On cross examination, defendant again admitted lying to his attorneys:

> Q: You lied to all the folks from the Cary Police Department that you have talked to, right?
>
> A: Yes, sir, I lied to everybody that night and every time after that fact that I was questioned about that event.
>
> Q: Okay.
>
> A: I lied to my family, my lawyers and everybody.

In his closing argument, defense counsel returned to the theme of defendant's implausible lie. Counsel argued:

> And while we're talking about that and your determination of whether this was a premeditated and deliberated killing with motive, consider this, from a guy who is

> supposed to be smart and a planner and all that: If you were going to do something and plan on doing it very carefully, all the way back to buying insurance and everything else, why in the world would you put yourself in the house with your intended victim, screen every call that came in, admit no one to the house and then set yourself up as the only possible suspect? And then after all that careful planning and execution of this careful plan to eliminate this person in a premeditated and a deliberate way, then the best you could do after thinking on it all the way back to June with Ron Keever and everything else, come up with that 9-1-1 call. And the – I think we've just used the word before – pathetic explanation for what happened and the persistence afterwards, all the way up to almost the beginning of the trial, in denying that you had anything to do with this or trying to create evidence to show that you just couldn't have done it, if it was so well planned.

Counsel summarized this theme: "If it had been premeditated, don't you know the story would have been better?"

The jury found defendant guilty of first degree murder on 13 June 2003, and he was sentenced to life imprisonment without parole. Defendant appealed.

I. Ineffective assistance of counsel

Defendant argues he received ineffective assistance of counsel because his attorney told the jury that defendant had repeatedly lied to his attorneys. Our review of ineffective assistance of counsel claims "will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). Here, the cold record from the trial transcript shows no further investigation is required for our review.

When making an ineffective assistance of counsel claim, defendant must show (1) counsel's performance was deficient, with errors so serious that the attorney was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment, and (2) the deficient performance prejudiced the defense to the extent there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different and defendant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 80 L. Ed. 2d 674, 693, 698 (1984); *State v. Braswell*, 312 N.C. 553, 561-63, 324 S.E.2d 241, 247-48 (1985) (expressly adopting the *Strickland v. Washington* test). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698; *accord Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

"Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687, 80 L. Ed. 2d at 693; *see also Braswell*, 312 N.C. at 563, 324 S.E.2d at 248-49.

The United States Supreme Court requires our restraint in second-guessing strategic decisions made by attorneys:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense

> attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 689-90, 80 L. Ed. 2d at 694-95 (citations omitted). "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 80 L. Ed. 2d at 695.

Defendant argues his counsel was deficient because his attorney shared with the jury the fact he lied to his defense counsel. He claims "no possible trial strategy could be served" by telling the jury he lied to his attorneys, and there was "simply no tactical reason that would justify an attorney affirmatively putting before a jury in a criminal case evidence that a client had lied to the attorney repeatedly about his guilt or about his version of the events." We disagree.

In our "highly deferential" review of defense counsel's conduct in this case, *Strickland,* 466 U.S. at 689-90, 80 L. Ed. 2d at 694-95, we view counsel's decision to address defendant's repeated lies as a prudent step in pulling the sting from damaging evidence. Defendant had lied to everyone, including family, friends, the police, and medical personnel. His claim that the victim had strangled herself was suspicious from the start. Such a lie, repeated to everyone, indicated defendant sought to protect himself from liability, and therefore his lies about the circumstances of her death further incriminated him in the murder

of Domenie. Any prosecution of defendant would include his lies as incriminating evidence, including their use as evidence against his truthfulness.

Since defense counsel knew defendant's lies would be an issue at trial, counsel attempted to turn defendant's lies into a favorable fact. Defense counsel was seeking to have defendant acquitted of first degree murder, and instead have defendant found guilty of a lesser-included crime such as second degree murder or voluntary manslaughter. Their hope of doing so relied on showing defendant had a less culpable mental state than premeditation or deliberation, a strategy apparent as early as defendant's 19 May 2003 declaration before trial admitting he had killed Domenie. Hence, defense counsel argued that if defendant had premeditated or deliberated Domenie's murder, he would have produced a more credible alibi than the "pathetic" one he continually provided. As counsel summarized in closing argument, "If it had been premeditated, don't you know the story would have been better?" Even the State acknowledges on appeal these arguments by defense counsel reflected a reasonable and shrewd defense strategy.

Although defense counsel noted in opening argument that defendant had lied to his attorneys, just as he had lied to everyone else, under the facts of this case we do not hold such an admission to be deficient performance by counsel. The theme counsel was arguing indicated defendant had a pattern of lying to everyone about the circumstances of Domenie's death, and acknowledging that "everyone" included

his attorneys did not exacerbate the incriminating aspect of defendant seeking to escape liability via his lies. Defense counsel's mention in the opening statement that defendant had lied to his attorneys was incidental to this theme; if anything, it merely served to further illustrate counsel's intended theme. When defendant took the stand and admitted, in both direct and cross-examination, he had lied to his attorneys, defendant himself explicitly participated in this defense strategy, and thereafter cannot complain that defense counsel utilized the strategy in closing argument.

Though it is possible other counsel may have proceeded with a different strategy, we cannot conclude the strategy employed by defendant's counsel was unreasonable nor, in our highly deferential review, deficient. Because we hold defense counsel's performance was not deficient, we need not address whether such performance prejudiced the defense and deprived defendant of a fair trial. *Id.* at 687, 80 L. Ed. 2d at 693; *see also Braswell*, 312 N.C. at 563, 324 S.E.2d at 248-49. Accordingly, we hold defendant did not receive ineffective assistance of counsel.

Defendant also argues defense counsel breached attorney-client privilege by telling the jury he had lied to his attorneys. According to defendant, the lies defendant told his counsel were confidential communications, and those communications were "privileged and may not be disclosed." *In re Investigation of the Death of Miller*, 357 N.C. 316, 328, 584 S.E.2d 772, 782 (2003). But the privilege "belongs to the

defendant, and may be waived by him." *State v. Bronson*, 333 N.C. 67, 76, 423 S.E.2d 772, 777 (1992). Since defendant admitted he lied to his attorneys in both his direct examination and cross-examination at trial, he therefore waived this privilege.

II. Burden of proof

Defendant claims a portion of the prosecutor's closing argument improperly shifted the burden of proof to defendant. At the end of the argument, the prosecutor said:

> The defendant has tried real hard when he testified to make his story – to make what he offered to you to fit the State's evidence that he knew we would present. He had months to do that. He is an engineer.
>
> He knows what the State reports are. He knows what those are. He has months to do that and to come in here and be able to tell you the little things that he thinks will make his story fit.
>
> But he wants to tell you a couple of other things, and that is that he actually did administer CPR on her. Think about whether or not that is the truth and compare that to the rest of everything that he said. Think about whether when he says when he is standing face to face to her, face to face, toe to toe, and that he doesn't remember what happened after he pulled that towel tight, that he doesn't remember that. Is that the

> truth? Is that really the truth? Because Dr. Radisch said that it would take more, in this case was not a four-minute thing. It was hands and a towel. The evidence shows you that it could be from behind because of the way the hairs were found on the towel and because of the way the marks are on her body and the lack of marks on his.
>
> You will have four options: First-degree murder, second-degree murder, voluntary manslaughter and the verdict form as perhaps required by law has to have not guilty on the bottom of it.
>
> In order for you to find the defendant guilty of voluntary manslaughter, you have to say that the emotions that were going on were so high.
>
> In order for you to find him guilty of second-degree murder, you have to say that he did not premeditate and deliberate.
>
> What I say to you this afternoon is that for you to find him guilty of anything less than first-degree murder, you will have to have decided for yourself individually and collectively that he has been telling the truth about what happened.

Defendant objected, which the trial court overruled. The jury was excused for lunch, and defendant renewed his objection, contending the prosecutor's argument was improper and impermissibly shifted the burden of proof from the State onto the defendant.

Defendant asked the trial court to instruct the jury to that effect when they returned from lunch. The trial court declined to do so, stating it would instruct the jury regarding the burden of proof pursuant to the proposed jury instructions.

During the jury instructions, the trial court instructed the jury:

> The defendant in this case has entered a plea of not guilty. The fact that he has been charged is no evidence of guilt. Under our system of justice, when a defendant pleads not guilty he is not required to prove his innocence. He is presumed to be innocent.
>
> The State must prove to you that the defendant is guilty beyond a reasonable doubt.

When instructing the jury on first degree murder, second degree murder, and voluntary manslaughter, the trial court repeatedly told the jury that the State bore the burden of proof to prove each element necessary for conviction of this crime charged and each lesser offense about which the jury was instructed.

When counsel makes a timely objection at trial, the standard of review for improper closing arguments is whether the trial court abused its discretion by failing to sustain the objection. *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). We should reverse a trial court and find an abuse of discretion,

however, "only upon a showing that its ruling could not have been the result of a reasoned decision." *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996) (citing *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)). When applying the abuse of discretion standard to closing arguments, we first determine whether the "remarks were improper," and if so, whether the "remarks were of such a magnitude that their inclusion prejudiced defendant." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106.

We need not make this determination, however, if the trial court's correct jury instructions on the law cured any mistakes made in the prosecutor's closing argument. "If the alleged misstatement of law was made, it was cured by the trial court's correct jury instructions on the relevant law." *State v. Price*, 344 N.C. 583, 594, 476 S.E.2d 317, 323-24 (1996) (citing *State v. Anderson*, 322 N.C. 22, 38, 366 S.E.2d 459, 468 (1988)); *see also State v. Rose*, 339 N.C. 172, 197, 451 S.E.2d 211, 225-26 (1994) (prosecutor's error in defining the term "reasonable doubt" was cured because the trial court's instruction, "which followed the complained-of statement by the prosecutor, remedied the error, if any, in the prosecutor's closing argument"), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995); *State v. Gladden*, 315 N.C. 398, 426, 340 S.E.2d 673, 690-91 (1986) ("Subsequently, the trial judge properly instructed the jury concerning the weight to be accorded prior inconsistent statements and cured any possible prejudice to the defendant which may have been caused by the prosecutor's

misstatement of the law."), *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

No error.

Judges HUDSON and BRYANT concur.

STATE OF NORTH CAROLINA			No.
WAKE County	RALEIGH Seat of Court		02CRS071304 51
NOTE: *[This form is to be used for (1) felony offense(s), and (2) misdemeanor offense(s), which are consolidated for judgment with any felony offense(s). Use ADC-CR-342 on DWI offense(s).]*			In The General Court of Justice ☐ District ☒ Superior Court Division

STATE VERSUS			JUDGMENT AND COMMITMENT ACTIVE PUNISHMENT FELONY (STRUCTURED SENTENCING)
Name Of Defendant CAMPBELL,IAN,AULDEN			
Race W	*Sex* M	*DOB* 3/24/1973	G.S. 15A-1301, 15A-1340.13

Attorney for State CUMMINGS,HOWARD,J	☐ *Def. Found Not Indigent*	☐ *Def. Waived Attorney*
Attorney For Defendant MANNING,T/CROUCH,J	☐ *Appointed*	☒ *Retained*

The defendant ☐ pled guilty to: ☒ was found guilty by a jury of: ☐ pled no contest to:

File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pun. CL.
02CRS071304	51	MURDER	7/25/2002	14-17	F	A	

*NOTE: *Enter punishment class if different from underlying felony class (punishment class represents a status or enhancement).*

The Court: **PRIOR RECORD LEVEL:** ☐ I ☐ II ☐ III ☐ IV ☐ V ☐ VI

☐ 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be ___.

☒ 2. makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses.

The Court: (NOTE: *Block 1 or 2 MUST be checked.*):

☒ 1. makes no written findings because the prison term imposed is: ☐ (a) within the presumptive range of sentences under G.S. 15A-1340.17(c). ☒ (b) for a Class A felony. ☐ (c) for an adjudication as a violent habitual felon. G.S. 14-7.12. ☐ (d) for drug trafficking offenses.

☐ 2. makes the Findings of Aggravating and Mitigating Factors set forth on the attached AOC-CR-605.

☐ 3. imposes the prison term pursuant to a plea arrangement as to sentence under Article 58 of G.S. Chapter 15A.

☐ 4. finds the defendant has provided substantial assistance pursuant to G.S. 90-95(h)(5).

☐ 5. adjudges the defendant to be an habitual felon to be sentenced as a Class C felon pursuant to Article 2A of G.S. Chapter 14.

☐ 6. finds enhanced punishment from a Class A1 or Class 1 misdemeanor to a Class I felony. ☐ G.S. 90-95(e)(3) (drugs); ☐ G.S. 14-3(c) (hate crime)

☐ 7. finds no Extraordinary Mitigation.

☐ 8. finds the above designated offense(s) is a reportable conviction involving a minor. G.S. 14-208.6.

☐ 9. finds the defendant is classified as a sexually violent predator. G.S. 14-208.20.

☐ 10. finds that the defendant used, displayed, or attempted to use or display a firearm at the time of the felony and, pursuant to G.S. 15A-1340.16A, has increased the minimum term of imprisonment to which the defendant would otherwise be sentenced by sixty (60) months.

The Court, having considered evidence, arguments of counsel and statement of defendant, finds that the defendant's plea was freely, voluntarily, and understandingly entered, and Orders the above offenses be consolidated for judgment and the defendant be imprisoned.

for a minimum term of: months	for a maximum term of: months	In the custody of:
☒ Class A Felony:	☒ *Life Imprisonment Without Parole* ☐ *Death (see attached Death Warrant and Certificate)*	☒ N.C. DOC. ☐ Sheriff pursuant to G.S. 15A-1352(b). ☐ Other _____.
☐ Class B1 Felony: *Life Imprisonment Without Parole* ☐ Violent Habitual Felon: *Life Imprisonment Without Parole*		

The defendant shall be given credit for 305 days spent in confinement prior to the date of this Judgment as a result of this charge(s).

☐ The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.

☐ The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

(NOTE: *List the case number, date, county and court in which prior sentence imposed.)*

File Number	*Offense*	*County*	*Court*	*Date*

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Material opposite unmarked squares is to be disregarded as surplusage.

(Over)

(check all that apply)

☐ 1. The defendant shall pay the costs.

☐ 2. The defendant shall pay a fine of $ _____.

The Court recommends:

☐ 3. Assignment to a substance abuse treatment unit. G.S. 15A-1351(h). (DART)

☐ 4. Psychiatric and/or psychological counseling.

☐ 5. Work Release.

☐ 6. Payment as a condition of post release supervision, if applicable, or from work release earnings, if applicable, of the items and amounts set out below.

Fines	*Costs*	*Restitution**	*Attorney's Fees*	*Total Amount Due*
$	$	$	$	$

See attached "Restitution Worksheet, Notice And Order (Initial Sentencing)," AOC-CR-611, which is incorporated by reference.

The Court further recommends:

The Court does not recommend:

☐ 1. Restitution as a condition of post release supervision or work release.

☐ 2. Work release.

AWARD OF FEE TO COUNSEL FOR DEFENDANT

☐ A hearing was held in open court in the presence of the defendant at which time a fee, including expenses, was awarded the defendant's appointed counsel or assigned public defender.

ORDER OF COMMITMENT/APPEAL ENTRIES

☒ It is ORDERED that the Clerk deliver ***two*** certified copies of this Judgment and Commitment to the sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.

☐ The defendant gives notice of appeal from the judgment of the Superior Court to the Appellate Division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

SIGNATURE OF JUDGE

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*
6/16/2003	**W. OSMOND SMITH**	/s/ W. Osmond Smith

ORDER OF COMMITMENT AFTER APPEAL

Date of Appeal Dismissed	*Date Withdrawal Of Appeal Filed*	*Date Appellate Opinion Certified*

It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the official named in this Judgment and furnish that official ***two*** certified copies of this Judgment and Commitment as authority for the commitment and detention of the defendant.

Date	*Signature Of Clerk*	☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk of Superior Court*

CERTIFICATION

I certify that this Judgment and Commitment with the attachment(s) marked below is a true and complete copy of the original which is on file in this case.

☑ Appeal Entries (AOC-CR-350).

☐ Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605).

☐ Judicial Findings As To Forfeiture Of Licensing Privileges (AOC-CR-317).

☐ Victim Notification Tracking Form attached.

☐ Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611).

Date	*Signature*
6/16/2003	SEAL
Date Certified Copies Delivered To Sheriff	☐ *Deputy CSC* ☑ *Assistant CSC* ☐ *Superior Clerk of Court*
6/16/2006	

AOC-CR-501, Side Two, Rev. 3/02
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APPENDIX F

FILED: April 29, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-7468
(5:07-hc-02201-BO)

IAN AULDEN CAMPBELL

Petitioner – Appellant

v.

ROY COOPER; FREDERICK HUBBARD

Respondents – Appellees

ORDER

The Court strictly enforces the time limits for filing petitions for rehearing and petitions for rehearing en banc in accordance with Local Rule 40(c). The petition in this case is denied as untimely.

For the Court – By Direction

/s/ *Patricia S. Connor, Clerk*

APPENDIX G

U.S. Constitution

Amendment 5 – Trial and Punishment, Compensation for Takings

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person *be subject for the same offense to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be *deprived* of life, liberty, or property, without *due process* of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution

Amendment 6 – Right to Speedy Trial, Confrontation of Witnesses

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

favor, and to have the Assistance of Counsel for his *defence*.

U.S. Constitution

Amendment 14 – Citizenship Rights

1. All persons born or naturalized in the United States, and subject to the *jurisdiction* thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State *deprive* any person of life, liberty, or property, without *due process* of law; nor deny to any person within its *jurisdiction* the equal protection of the laws.

2. Representatives shall be *apportioned* among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of

such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX H

27 NCAC 02 Rule 1.06

Confidentiality of Information

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(1) to comply with the Rules of Professional Conduct, the law or court order;

(2) to prevent the commission of a crime by the client;

(3) to prevent reasonably certain death or bodily harm;

(4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or

civil claim against the lawyer based upon conduct it which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

(c) The duty of confidentiality described in this Rule encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this Rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

APPENDIX I

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
WAKE COUNTY	02 CRS 71304

STATE OF NORTH CAROLINA)
)
versus)
)
IAN AULDEN CAMPBELL,)
Defendant)

DECLARATION OF DEFENDANT AND DEFENSE COUNSEL REGARDING TRIAL

The Defendant, IAN AULDEN CAMPBELL, and trial counsel, Thomas C. Manning and James A. Crouch, respectfully inform the Court of the following matters regarding the intended trial position of the Defendant:

1. That the Defendant is aware that the State of North Carolina, through the office of the District Attorney for the Tenth Judicial District of North Carolina, contends that he has committed the offense of First Degree Murder in the death-of Heather Anne Domenie on July 25, 2002.

2. That the Defendant has been advised of the elements of First Degree Murder, Second Degree Murder and Voluntary Manslaughter under North Carolina law.

3. The Defendant has entered a plea of NOT GUILTY to the charged offense of FIRST DEGREE MURDER, and he maintains his innocence as to the charge of FIRST DEGREE MURDER.

4. That the Defendant admits that he assaulted Heather Anne Domenie on July 25, 20032 [/s/ TM JAC IC] and that his assault upon her proximately caused her death. The Defendant acknowledges his responsibility for Heather Domenie's death on July 25, 2002, in Wake County.

[Filed 5-19-03
10:25 AM
SB Milone
Dep Clerk]

5. The Defendant and his trial counsel contend that he is not guilty of the offense of First Degree Murder, but rather that he is guilty of a lesser-included offense of homicide in violation of the North Carolina General Statutes.

6. The Defendant is aware and has been advised that he is not required to offer evidence in his own behalf, that he has the right to remain silent, and that he has the right to rely upon the presumption of innocence during his trial, and does maintain that he is presumptively innocent of the charge of First Degree Murder. He is aware of and has been advised that, by making this declaration, that he is conceding that he is guilty of a homicide offense under North Carolina law other than First Degree Murder.

7. The Defendant consents to his trial counsel pursuing, at trial, a course of defense which admits his assault upon Heather Anne Domenie, and plans to present evidence, including testifying in his own defense, and offering other evidence which he and his trial counsel contend will dispute the State's contention that he is guilty of First Degree Murder, but which will establish that he is guilty of a lesser-included offense of homicide other than First Degree Murder.

This, the 17th day of May, 2003.

/s/ Ian Aulden Campbell
Ian Aulden Campbell
Defendant

/s/ Thomas C. Manning
Thomas C. Manning,
NCSB #7887

/s/ James A. Crouch
James A. Crouch,
NCSB #18975
Post Office Box 350
16 West Martin Street
Raleigh, North Carolina
27602-0350
Attorneys for Defendant

APPENDIX J

27 NCAC 02 Rule 1.00

Terminology

1.0: Terminology

* * *

(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances.

* * *

APPENDIX K

NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE — SUPERIOR COURT DIVISION
02 CRS 71304

STATE OF NORTH CAROLINA)
vs.)
IAN AULDEN CAMPBELL,)
Defendant.)

TRIAL TRANSCRIPT
VOLUME SIX
T* R* I* A* L
Monday,
June 2, 2003

PROCEEDINGS in the above-entitled cause before The Honorable W. Osmond Smith and a jury in Wake County Superior Court commencing Monday, May 19, 2003, in Raleigh, North Carolina.

APPEARANCES:

For the State: Mr. Howard Cummings, Assistant District Attorney.

For Defendant: Mr. Thomas Manning and Mr. James C. Crouch, Attorneys at Law.

* * *

[1289] Well, then his mother and father who had been divorced seven years, they come together because it's their boy, and the press is everywhere, and they're shoving mikes in his face, so his parents come in, and his aunt, who is an emergency room – I mean, an operating nurse in Charleston – show up on

late Saturday night, and he tells them the same thing.

Well, then I think it was Justin, maybe some other friend of Ian's, the family says, well, you know we don't know about American law, we need to get a lawyer.

Well, they call somebody who calls somebody, says, Well, Tommy Manning knows what he's doing, call him.

So I'm over there on Sunday, the evidence will show, and he's lying to everybody. Everybody. Well, it goes on for months, months and months.

Mr. Cummings, as it's his duty to do as a prosecutor, hands me they evidence that the State is collecting against Mr. Campbell.

We get the autopsy photographs, get the autopsy reports. We commission our own investigation, hire pathologists to look at everything.

Mr. Cummings' experts' conclusions are conclusive, that it's strangulation, by ligature.

[1290] I'm not going to tell you what our people told us, but you can imagine what they told us, looking at the same evidence that the State's people did.

Well, I didn't do it, is what Ian says. Well, unbeknownst to everybody else, he's talking to people in the jail about his case, you know, even when the lawyers say – he didn't want a lawyer either, for that

matter, but, anyway, it's not until April – April – five weeks from the beginning of jury selection, that after being under enormous pressure from his family and from his lawyers and everybody else that cares anything about him, he tells us what he did and what happened.

But it's not over yet. Within a couple of days of his disclosure as to what happened in that room and his saying that he was responsible and that he had killed her and how he killed her, there's a hearing in this courtroom with some pretrial motions in this case where we – you know, Ian comes over and we have motions.

Well, it's really not relevant here, but at that stage in pretrial, there's very little left to do, and so whatever we were raising about Ian's citizenship and other matters, Judge Smith denied

* * *